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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

No. 563.

MANUEL CEDILLO ET AL.,
Petitioners,

vs.

STANDARD OIL COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

No.

MANUEL CEDILLO ET AL.,
Petitioners,

vs.

STANDARD OIL COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Manuel Cedillo, Alberto Sanchez, and thirty-six others present this, their Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit, and to such end respectfully show:

A.

OPINION BELOW.

The opinion of the Court of Appeals is found at page 302 of the record. The District Court wrote no opinion.

B.

STATEMENT OF JURISDICTION.

The judgment sought to be reviewed is dated and was entered May 26, 1961 (R. 302). Petition for Rehearing was filed on June 14, 1961 (R. 309), and was overruled on September 11, 1961 (R. 315).

The jurisdiction of this Court is invoked under Section 1254 (1) of the Judicial Code, 28 U.S.C.A., Section 1254 (1).

C.

QUESTIONS PRESENTED.

The questions presented here are:

A. Whether or not Petitioners, unskilled workers, who were employed for periods of two to ten years in the same class of maintenance work required in the usual operation of the refinery of Respondent Standard Oil Company, under the direction, control and supervision of Respondent, were employees of Respondent and under the Labor Management Act.

B. Whether or not employees who are not members of the collective bargaining union are entitled to the benefits and provisions of the collective bargaining contract.

C. Whether or not employees may waive this right to be classed as employees of a company subject to Labor Management Act.

D.

STATUTES INVOLVED.

The Statute involved here is Section 151, Title 29, U.S. C.A., set out in appendix, page A10, and Section 152, Subsection (3), Title 29, U.S.C.A., set out in appendix, page A12.

E.

STATEMENT OF CASE.

In this case, Manuel Cedillo, Alberto Sanchez and thirty-six others filed suit claiming to be employees of Standard Oil Company of Texas against the Standard Oil Company for back wages and benefits, equivalent to those paid employees of the Company under a collective bargaining agreement under the National Labor Relations Act. alleging employment of a permanent nature by Petitioners for periods of time extending for each employee from two to ten years, in regular work, required in the ordinary operation of Respondent's Standard Oil Company of Texas refinery operation in El Paso, alleging they were hired by Respondent Standard Oil and under the direction and control of Standard Oil in the performance of its work and that they are subject to the National Labor Relations Act and National Labor Management Act and as such were employees of the Respondent Standard Oil and entitled to the same wages and benefits as its other employees.

Respondent Standard Oil (R. 1-7) denied that Petitioners were its employees and alleged that they were employees of an independent contractor (R. 9), and further

alleged that they were not members of the Union negotiating the collective bargaining agreement and therefore were not entitled to its benefits (R. 9-10) and that they failed to follow the grievance procedure provided in the collective bargaining agreement (R. 8).

The case was tried before the Court without a jury and the Court entered its judgment, finding that Petitioners were not employees of Respondent Standard Oil Company but were employees of an independent contractor (R. 280-281).

Circuit Court of Appeals entered this judgment, affirming the Trial Court, holding that Petitioners were not subject to the National Labor Relations Act and the National Labor Management Act and that they were not members of the exclusive bargaining union and therefore not entitled to its benefits and that the National Labor Relations Act and the Labor Management Act were inappropriate and inapplicable to the case and that Petitioners were not employees of the Standard Oil Company (R. 302-307). Petition for rehearing was filed (R. 309-314) on June 14, 1961, which was denied on September 11, 1961.

F.

BASIS FOR JURISDICTION.

REASONS FOR ALLOWANCE OF WRIT.

The Circuit Court based its opinion on the erroneous conclusion that the status of Petitioners was not subject to or determined by the Labor Management Act even though admittedly Respondent is subject to the act in its relation to its employees. The decision of the Circuit Court curtails and limits the application of the Labor Management

Act, and is contrary to this Court's decisions construing the meaning of "employees" under the act.[1]

The Petitioners in this case are all illiterate Mexican common laborers, untrained, who were doing work requiring no skill or experience, of a permanent nature in the ordinary operation of Respondent's refinery, for ten years, who were excluded from the Union with bargaining rights (which Union was composed of Anglo Americans), who were hired by Respondent and under the direction and control of Respondent in the performance of its work, and who were, as a matter of economic reality, dependent upon the business of Respondent to which they rendered their services for their livelihood.

The Respondent, in an attempt to avoid the consequences of the employer-employee relationship under the Labor Management Act, and the collective bargaining agreement negotiated thereunder, attempted to make them employees of an independent contractor, who was nothing more than a glorified bookkeeper, keeping the pavroll, personnel and deduction records for Social Security and Workmen's Compensation Insurance.

The Labor Management Act cannot be evaded and its purposes subverted by subterfuge. If the contract herein relied on to create the relationship of "independent contractor" is upheld, the Labor Management Act will be nullified. This Court has held that subterfuge cannot be used to evade the act, that economic reality determines the relation under the Act and that neither the employee alone, nor with the employer, may waive or destroy the rights created under the Act.

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1. *N.L.R.B.* v. *E. C. Atkinson Co.*, 331 U.S. 398; *U. S.* v. *Silk*, 331 U.S. 704; *J. I. Case Co.* v. *N.L.R.B.*, 321 U.S. 332; *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722; *N.L.R.B.* v. *Hearst Publications*, 322 U.S. 111.

As stated in *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722.

> "Where the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of the Act."

The Supreme Court has repeatedly held that an employee was one whose work followed the usual path of an employee and included those who, as a matter of economic reality, were dependent upon the business to which they rendered service.

In the case of *J. I. Case Company* v. *N.L.R.B.*, 321 U.S. 332, the Court at great length sets forth the effect of the collective bargaining agreement and the relation of the individual employee to the agreement. The Court states:

> "After the collective trade agreement is made, the individuals who shall benefit by it are identified by individual hirings. The employer, except as restricted by the collective agreement itself and except that he must engage in no unfair labor practice or discrimination, is free to select those he will employ or discharge. But the terms of the employment already have been traded out. There is little left to individual agreement except the act of hiring. This hiring may be by writing or by word of mouth or may be implied from conduct. In the sense of contracts of hiring, individual contracts between the employer and employee are not forbidden, but indeed are necessitated by the collective bargaining procedure.
>
> But, However engaged, an employee becomes entitled by virtue of the Labor Relations Act somewhat as a third party beneficiary to all benefits of the collective trade agreement, even if on his own he would yield to less favorable terms. The individual hiring contract is subsidiary to the terms of the trade agreement and may not waive any of its benefits."

And the Court further states:

> "Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement. 'The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices.' National Licorice Co. v. National Labor Relations Bd., 309 U.S. 350, 364, 84 L. Ed. 799, 810, 60 S. Ct. 569. Where-ever private contracts conflict with its functions, they obviously must yield or the Act would be reduced to a futility.
>
> "It is equally clear since the collective trade agreement is to serve the purpose contemplated by the Act, the individual contract cannot be effective as a waiver of any benefit to which the employee otherwise would be entitled under the trade agreement."

The facts on which Petitioners base this claim are undisputed. The question involved is not whether Respondent can have the services performed by Petitioners, done so through independent contractor—although, by virtue of the nature of the works we do not believe it could relieve itself through independent contractor of direction and control and the obligations fixed by law—but whether Respondent did give up its control and direction of Petitioners through its contract and its conduct to an independent contractor. The contract is set out (R. 98-106) "Standard Oil Company to furnish supervision". All work orders under the contract provided "as instructed by" Respondent's foreman (R. 266-7).

The testimony of Petitioners was undisputed and unchallenged as to their employment, supervision, direction and control by Respondent (R. 15-137).

CONCLUSION.

Wherefore, the Petitioners pray the Supreme Court to issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

ERNEST GUINN,
400 Bassett Tower,
El Paso, Texas,

By .....

CERTIFICATION.

Ernest Guinn, Counsel preparing the foregoing Petition for Writ of Certiorari, hereby certifies that the same is made in good faith; that in his opinion there are good grounds for same, and that such petition is not filed for delay.

Ernest Guinn, further certifies that two copies of this Petition for Writ of Certiorari have been mailed with first class postage prepaid addressed to Messrs. Scott, Hulse, Marshall & Feuille, 1100 First National Building, El Paso, Texas, and copy of the printed record delivered to them.

.....,
ERNEST GUINN.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18293

MANUEL CEDILLO, ALBERTO SANCHEZ ET AL.,
Appellants,

vs.

STANDARD OIL COMPANY OF TEXAS,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS.

(May 26, 1961.)

Before CAMERON and BROWN, Circuit Judges, and HANNAY, District Judge.

CAMERON, Circuit Judge: We are called upon here to determine whether the appellants were in fact the employees of Standard Oil Company of Texas, appellee, and,

as such employees, were covered by the provisions of the collective bargaining contract existing between Standard Oil and The International Union of Operating Engineers, Local No. 552, the certified bargaining agent for Standard's employees. The lower court found they were not. We agree.

The appellants, Manuel Cedillo, Alberto Sanchez and thirty-six others, had worked as laborers for various periods of time in the maintenance division at the El Paso County, Texas, plant of Standard Oil. At all times relevant hereto Standard had a bargaining contract with I.U.O.E. which covered, among other things, such wages and benefits to which Standard's employees would be entitled. The appellants were not members of the I.U.O.E., belonging, instead, to the Hod Carriers' Union.

Standard Oil also had a contract with Vowell Construction Company, which provided that Vowell would furnish to Standard the necessary labor and equipment required by Standard to maintain the plant. At the end of each month Vowell would bill Standard, at pre-determined rates, for the amount of labor and equipment used during the month. This contract expired by its own terms January 4, 1957, and was not renewed when Vowell was underbid for the work to be done during 1957.

Eight of the appellants were laid off in November, 1956 when Standard informed Vowell that less men would be needed to handle the work. The employment of the remaining appellants was terminated by Vowell upon expiration of the contract on January 4, 1957.

Thereafter appellants, through the Hod Carriers' Union, filed charges with the National Labor Relations Board against Standard Oil, alleging, among other things, that Standard had caused Vowell to terminate their em-

ployment. These charges were investigated, but the Regional Director found the evidence would not support the issuance of a complaint. This action was appealed to, and upheld by, the General Counsel.

The gravamen of the complaint filed below[1] is that appellants were in fact the employees of Standard Oil and, as such employees, were entitled to the same benefits and protection of the bargaining contract as were the other employees of Standard. Prayer was for damages equivalent to the sum of back wages lost by appellants as the result of Standard's paying them wages less than that called for by the contract, plus such wages as were owing them since date of their alleged wrongful discharge. All relief was denied appellants when the lower court found that they had been employees of Vowell Construction and not of Standard Oil.

Appellants, in their brief, make repeated references to the National Labor Relations Act and alleged violations thereof by Standard in dealing with these appellants, but such arguments are inappropriate here since the "Plaintiffs' Original Amended Petition," upon which this case was tried, made no mention of the Act and in no way brought the action within its scope.

Stripping this case down to its fundamentals, we have presented nothing but a challenge of the findings of fact of the trial court. It is well settled that, in order for a reviewing court to set aside findings of fact by a trial

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1. A previous suit was filed by appellants against this appellee based upon the same facts seeking reinstatement and back wages, but the lower court dismissed the petition on the ground that the alleged cause of action was within the exclusive jurisdiction of the National Labor Relations Board. On appeal we reversed and remanded on a point not material here, 1958, 261 F.2d 443.

court sitting without a jury, it must be clearly demonstrated that such findings are without adequate evidentiary support in the record, or were induced by an erroneous view of the law,[2] and the burden of showing that the findings are "clearly erroneous" is on the one attacking them.[3] A thorough study of the entire record in this case convinces us that this burden has not been successfully discharged by appellants.

On the contrary, the evidence presented to the trial judge fully supports the findings made. It was shown, for instance, by testimony and exhibits, much of which was undisputed: that Vowell Construction handled all necessary personal information of the appellants, including the social security numbers; that appellants were carried on Vowell's payroll, and it was Vowell who did the actual paying of appellants; that all pay records were kept by Vowell, including the 1948-1956 records here involved; that Vowell made all income tax deductions from appellants' pay and deducted and paid the required social security tax; that workmen's compensation insurance was carried by Vowell on the appellants, and whenever appellants applied for Texas Workmen's Compensation Benefits after release from employment, they signed up as employees of Vowell, and the payments made to them were charged against Vowell's account; that appellants had the benefit of Vowell's employee benefit plan; that several of the appellants were driven to work each day in a truck sup-

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2. Rule 52(a), Federal Rules of Civil Procedure, 28 U.S.C.A.; *Kwong* v. *Occidental Life Insurance Co. of California*, 5 Cir., 1960, 273 F.2d 691, 695; *Bogue Electric Manufacturing Co.* v. *Coconut Grove Bank*, 5 Cir., 1959, 269 F.2d 1, 4; *Burgher* v. *Campbell*, 5 Cir., 1957, 244 F.2d 863, 864.

3. *United States* v. *duPont & Co.*, 1955, 351 U.S. 377, 381; *Grace Bros.* v. *Commissioner of Internal Revenue*, 1949, 173 F.2d 170, 174.

plied by, and driven by an employee of, Vowell; that the tools and equipment used by appellants in their work at Standard's plant were owned and supplied by Vowell; that Vowell carried an insurance and retirement program for its employees, and those of the appellants who had worked the required length of time signed up for these programs; that Standard's employees belonged to the I.U.O.E., while appellants belonged to the Hod Carriers' Union, the latter union having no contract with Standard; that a seniority list was maintained under the bargaining contract between Standard and I.U.O.E., which list did not include appellants; that appellants, through the Hod Carriers' Union, filed charges with the N.L.R.B. against Standard on the theory that they were employees of Vowell; and that the tax withholding statements showed appellants' employer to be Vowell.

There was additional evidence introduced which showed the employer-employee relationship actually to exist between Vowell Construction and the appellants rather than between Standard Oil and the appellants, but in view of the overwhelming showing set out above, we deem it unnecessary to develop the thesis further.

Concluding, therefore, from the record before us that appellants were not the employees of Standard Oil, it follows that they are not covered by the provisions of the bargaining contract between Standard and its employees. Keeping in mind that this case is to be decided on common law principles and not pursuant to the National Labor Relations Act, appellants are forced to demonstrate, since they are actually suing as third-party beneficiaries to the contract, that the contracting parties intended the contract to be for their benefit, and that

they accepted it either expressly or by necessary implication.[4]

Here, there is abundant evidence to show that, at the negotiations between Standard and the International Union of Operating Engineers, the I.U.O.E. did not intend to contract for the benefit of the appellants as members of the Hod Carriers' Union. And there is no evidence that appellants ever accepted the contract, if they had the power so to do.

In view of the foregoing, the judgment of the court below is, in all respects,

AFFIRMED.

A true copy

Test: Edward W. Wadsworth
Clerk, U. S. Court of Appeals, Fifth Circuit
By Clara R. James
Deputy
New Orleans, Louisiana
(Seal) October 18, 1961

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4. The following cases from Texas support this proposition: *Stahl* v. *Rawlins*, Civ. App., 1957, 304 S.W.2d 594; *Lindler* v. *MacClure*, Civ. App. 1956, 292 S.W.2d 381; *Banker* v. *Breaux*, Comm. of App., 1939, 128 S.W.2d 23; *Trice* v. *Lee*, Civ. App. 1938, 119 S.W.2d 673; *Cannonball Motor Freight Lines* v. *Grasso*, Civ. App., 1933, 59 S.W.2d 337. See also 10-A Tex. Jur. (Rev.), Contracts, §291.

JUDGMENT.

Extract from the Minutes of May 26, 1961.

MANUEL CEDILLO, ALBERTO SANCHEZ ET AL.,

No. 18293 versus

STANDARD OIL COMPANY OF TEXAS.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Manuel Cedillo, and others and the surety on the appeal bond herein, St. Paul Mercury Insurance Co., be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

Filed 11th day of September, 1961. Edward W. Wadsworth, Clerk of the United States Court of Appeals.

[86] **IN THE**

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18293

MANUEL CEDILLO, ALBERTO SANCHEZ ET AL.,
Appellants,

vs.

STANDARD OIL COMPANY OF TEXAS.
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS.

(September 11, 1961.)

ON PETITION FOR REHEARING.

Before CAMERON and BROWN, Circuit Judges, and HANNAY, District Judge.

PER CURIAM.

Upon considering the petition for rehearing filed by appellants, it is ordered that said petition be and it hereby is DENIED.

SEC. 151, TITLE 29, U.S.C.

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly ad-

justment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

SEC. 152, SUBSECTION (3), TITLE 29, U.S.C.

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual having the status of an independent contractor, or in the domestic service of any family or person at his home, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

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MANUEL CEDILLO, *et al.*,
Petitioners,

v.

STANDARD OIL COMPANY OF TEXAS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

Petitioners' statement of the "Questions Presented" is incorrect, as they state questions which were not decided by the Court of Appeals. That Court decided only, with respect to Question A, that Petitioners were not employees of Standard; and that Petitioners' "First Amended Original Petition" did not plead, and therefore did not raise any question of their status under the National Labor Relations Act, as amended. Neither Question B nor C, as stated, are in issue, as they were neither raised in the Trial Court nor passed on by the Court of Appeals. That Court affirmed the judgment of the Trial Court, and held that Petitioners

were not employees of Standard, and secondarily, that the facts show the collective bargaining contract was not negotiated for the benefit of Petitioners.

The Court of Appeals held:

(1) This case by its nature is to be decided on common law principles, and not on the National Labor Relations Act, as amended (29 U.S.C., Secs. 151-168), stating "the 'Plaintiffs' Original Amended Petition', upon which this case was tried, made no mention of the Act and in no way brought the action within its scope."

(2) Plaintiffs (Petitioners) were not employees of Standard Oil Company of Texas.

(3) Plaintiffs (Petitioners) were not third-party beneficiaries of the contract between Standard and the International Union of Operating Engineers, since the evidence shows the parties did not intend to contract for the benefit of Plaintiffs; and, further, there is no evidence to show Plaintiffs accepted the contract, if they had the power to do so.

These holdings are abundantly supported by the record in this case.

THIS IS A COMMON LAW ACTION, AND 29 U.S.C.A. SECS. 151-152 ARE NOT INVOLVED

The history of this case pinpoints the fact that the National Labor Relations Act, as amended, is not involved. Plaintiffs filed their "Original Petition", alleging wrongful discharge, with several references therein to the National

Labor Relations Act and the National Labor Relations Board. The relief prayed for in said "Original Petition" was not only for damages but also for reinstatement, with back pay from date of alleged wrongful discharge, and for an injunction against violation of their contract, which contract was alleged to have been approved by, and executed at the direction of the National Labor Relations Board. The District Court dismissed said petition on the ground the cause of action alleged was in the exclusive jurisdiction of the National Labor Relations Board, but permitted the Plaintiffs to file an amended pleading. The case went to the Court of Appeals at this point, and its opinion, which is reported at *261 Fed. (2) 443*, is set out in Appendix "A" to this Reply. The said Original Petition is set out in Appendix "B" to this Reply.

Plaintiffs filed their "First Amended Original Petition" (R. 1-7), omitting all references to the National Labor Relations Act, as amended, and to the National Labor Relations Board, and abandoned their previous prayer for injunction, reinstatement and back pay for time lost. In the "Amended Original Petition", Plaintiffs sought only a money judgment for wages and benefits on the common law theory that they were employees of Standard, and were third-party beneficiaries under the Collective Bargaining Agreement between Standard and the Internaitonal Union of Operating Engineers (R. 1-7). The "Amended Original Petition" was based entirely on common law, and relief was sought as at common law for breach of contract.

It thus appears Petitioners originally filed this suit on the theory they had rights under the National Labor Relations Act which they were seeking to enforce in Court. It also appears that they omitted from their "Amended Original Petition" all reference to the National Lebor Relations Act and the National Labor Relations Board.

It will be noted, however, that prior to filing this action, Petitioners sought relief from the National Labor Relations Board. They filed several unfair labor practice charges, one against Vowell, and three against Standard (R. 199-205, Ex. D 17-31), all antedating the filing of this action. These charges were investigated by the National Labor Relations Board, which found that no grounds existed upon which to issue a complaint, and on Petitioners' appeal to the General Counsel, he sustained the action of the Regional Director in refusing to issue complaints (R. 199-205, Ex. D 17-13.)

It is, therefore, clear that the Court of Appeals was correct in holding that the repeated references by Petitioners in their brief to the National Labor Relations Act, as amended, and alleged violations thereof by Standard in dealing with Petitioners, are inappropriate, as their cause of action is not alleged to be, and in fact is not, based upon the National Labor Relations Act, as amended. The Court of Appeals correctly states, and holds, that this suit is to be decided upon common law principles.

On the other hand, if it were a suit for violation of said Act, then the rule of exclusive jurisdiction being vested in the Board would apply.

The argument set out in Petitioners' Petition for Writ of Certiorari is an attempt to switch horses in the middle of the stream. They commenced this action, alleging rights under the Act, and thereafter, in order to avoid dismissal on the ground the Board had exclusive jurisdiction, they abandoned that action, in favor of the common law action set forth in their "Amended Original Petition". Trial on the merits was had on the common law action, and resulted in a judgment for Respondent, and that is the judgment which was affirmed by the Court of Appeals. As stated in the latter Court's opinion, Petitioners, in their brief, made repeated references to the National Labor Relations Act. They have continued to attempt to work into the case some violation of the Act, despite the omission of reference to it in their "Amended Original Petition", and despite the rulings of the Board that they did not show themselves entitled to any relief at the hands of the Board. Petitioners are attempting to jockey back and forth between a claimed right under the Act, which would require them to go to the Board for relief, and an alleged right under common law principles, which they have failed to sustain. The only conclusion which can be drawn is that the Court of Appeals correctly analyzed their alleged cause of action, and correctly affirmed the judgment of the Trial Court.

THE COLLECTIVE BARGAINING CONTRACT WAS NOT MADE FOR THE BENEFIT OF PETITIONERS

Plaintiffs base their common law action upon a contract to which they are not parties. To be entitled to the relief prayed for in the "Amended Original Petition", they must, there-

fore, demonstrate that the contracting parties intended the contract to be for their benefit, and that they accepted it, either expressly or by implication. There is ample evidence to sustain the finding of the Trial Court, which was expressly affirmed by the Court of Appeals, that this contract was not made for the benefit of Plaintiffs (R. 286-7, 289). Not only were the Plaintiffs members of another Union, the Hod Carriers, as contracted with the International Union of Operating Engineers, which had the contract with Standard, but the undisputed testimony also is that the common laborer referred to in the I.U.O.E. contract was negotiated for the benefit of one person only, namely, a janitor (R. 238, 239, 240, 247). The Court so found (R. 287). It expressly appears in the evidence that those who negotiated the contract for the Union considered Petitioners to be employees of Vowell, as they were (R. 229), and not of Standard, and they were not discussed or in any way intended to be covered by the contract. In view of the express findings which support the above statements, sustained by ample evidence, there is no basis for contending that this contract was negotiated for their benefit, or that they are entitled to the benefits of it. There is also an express finding by the Trial Court, which is sustained by the evidence, that Petitioners repudiated the I.U.O.E. contract (R. 284, 289). The Court of Appeals held Petitioners must have accepted the contract, as for their benefit, but that they did not do so. Thus they are in no position to assert any rights under it.

THE TRIAL COURT AND THE COURT OF APPEALS CORRECTLY HELD PETITIONERS WERE NOT EMPLOYEES OF STANDARD

The testimony is overwhelming that Plaintiffs were employees of Vowell Construction Company, and were not employees of Standard Oil Company of Texas. The Trial Court expressly so found and held (Findings, R. 282-288, and Conclusions of Law, R. 288-290), and this is one of the express grounds upon which its judgment was affirmed by the Court of Appeals. The great preponderance of the evidence in this respect clearly shows that the findings of the Trial Court are correct. They, therefore, come within the provisions of *Rule 52, F.R.C.P.* These findings are concurred in by both the District Court and the United States Court of Appeals, and are, therefore, conclusive. *Graver Tank & Mfg. Co. v. Linde Air Products Co., (1949), 336 U. S. 271, 275, 69 Sup. Ct. 535, 93 L. Ed. 672.* It follows that the judgments of both the Trial Court and the Court of Appeals are correct.

PETITIONERS, HAVING FIRST SOUGHT RELIEF FROM THE NATIONAL LABOR RELATIONS BOARD, ELECTED THAT REMEDY

What is said here about the Plaintiffs having been to the National Labor Relations Board with several unfair practice complaints, prior to filing of this court action also shows, as alleged and presented by Respondent in the Trial Court and in the Court of Appeals, that the Plaintiffs had an election of remedies, and that they elected in the first place to make their complaints to the National Labor Relations

Board; and only after the Board had resolved the issue against them, did they file this action. Under the doctrine of election of remedies, having elected one remedy, and having lost before their chosen tribunal, they should not be allowed to pursue or elect a different course, seeking a different remedy, before a different tribunal.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted

J. F. HULSE,

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CERTIFICATE OF SERVICE

It is hereby certified that service of two copies of this Brief has been made on opposing counsel, by mail, on this the 8th day of December, 1961.

W. A. Thurmond

EXHIBIT "A"

United States Court of Appeals

FIFTH CIRCUIT

December 11, 1958

No. 17239

MANUEL CEDILLO, ALBERTO SANCHEZ, *et al.*,
Appellants,

v.

STANDARD OIL COMPANY OF TEXAS,
Appellee.

[Reported in 261 Fed. (2) 443]

Plaintiffs filed original petition for injunction requiring reinstatement and back pay, and the defendant made a motion to dismiss the petition, on ground that alleged cause of action was within exclusive jurisdiction of the National Labor Relations Board and that plaintiffs had invoked its jurisdiction. Thereafter plaintiffs filed their first amended original petition, thereby superseding original petition and seeking only a money judgment for wages and benefits. The United States District Court for the Western District of Texas, R. E. Thomason, J., entered judgment dismissing the action, and the plaintiffs appealed. The Court of Appeals held

that District Court erred in hearing and considering plaintiff's abandoned original petition and defendant's motion to dismiss the original petition and in then ordering that action should be dismissed.

Reversed and remanded.

Federal Civil Procedure—852, 1742

Where plaintiffs filed original petition for injunction requiring reinstatement and back pay, and defendant made motion to dismiss petition, on ground that alleged cause of action was within exclusive jurisdiction of National Labor Relations Board and that Plaintiffs had invoked its jurisdiction, and thereafter plaintiff filed first amended original petition, thereby superseding original petition, and seeking only money judgment for wages and benefits, federal District Court erred in proceeding to hear and consider the abandoned original petition and defendant's motion to dismiss and in dismissing the action.

Ernest Guinn, El Paso, Texas, for appellant.

J. F. Hulse, El Paso, Texas, Scott, Hulse, Marshall & Feuille, El Paso, Texas of counsel, for appellee,

Before HUTCHESON, Chief Judge, and CAMERON and BROWN, Circuit Judges.

PER CURIAM.

On April 8, 1957, plaintiff's filed their original complaint for an injunction requiring reinstatement and back pay. On April 30, 1957, defendant moved to dismiss the complaint on

the ground that the alleged cause of action was within the exclusive jurisdiction of the National Labor Relations Board and that plaintiffs had invoked its jurisdiction. On March 10, 1958, plaintiffs filed their first amended original petition, thereby superseding their original petition, and in it sought only a money judgment for wages and benefits. On April 2, 1958, as a result of an oversight of the amended complaint, which the record does not explain, the district judge "proceeded to hear and consider the plaintiffs' original petition, same being the complaint filed by plaintiffs herein, and to hear defendant's motion to dismiss", and thereupon to order "that defendant's motion to dismiss is granted and the action is hereby dismissed."

In thus basing his action on, and dismissing, an abandoned pleading, the district judge erred, and the judgment must be reversed and the cause remanded for further and not inconsistent proceedings.

Reversed and remanded.

EXHIBIT "B"

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

EL PASO DIVISION

No. 1820 Civil

MANUEL CEDILLO, ALBERTO SANCHEZ, *et al.*,
Plaintiffs,

v.

STANDARD OIL COMPANY OF TEXAS,
Defendant.

PLAINTIFFS' ORIGINAL PETITION

To the Honorable Judge of Said Court:

Comes now Manuel Cedillo, Alberto Sanchez, Miguel Cadena, Gregorio Ceniceros, Isaac Torres, Manuel Leyva, Juan Torres, Ignacio Gonzales, Ysidro Escobar, Juan Salazar, Gilberto Maese, Jesus Moreno, Roberto Torres, Jose Maria Duran, George Cervantes, Blas Cadena, Maurilio Blanquez, Pedro Duran, Ramon Ortega, Juan Cobos, Jose G. Nunez, Jose Peralta, Jr., G. Arguellas, Lorenzo Gonzalez, Angel Blanquez, Jose Ceniceros, Juan Bueno, Hector Sepulveda, Jose Hector Paquian, Felipe Aguilar, Sixto Maltos, Jesus Cruz, Raymundo Ortega, Manuel Velardo, Manuel Rogalio Reyes,

Cruz Carabajal, Baldonero Medina and Guadalupe Duran, residents of El Paso County, Texas, hereinafter called Plaintiffs, complaining of Standard Oil Company of Texas, a corporation, with Offices in El Paso County, Texas, and for cause of action would respectfully show the Court:

I.

All of the Plaintiffs were employees of the Standard Oil Company of Texas, having been employed from two to ten years as laborers in the Maintenance Division of the Defendant's plant in El Paso County, Texas, the dates of their respective employment being set out opposite the name of each, attached hereto and marked Exhibit A.

II.

During the entire time of their employment, Plaintiffs received pay varying from 60 cents an hour to 1.11 per hour. Defendant has all records showing the exact amount paid said employees during their entire time of employment and is called upon to produce same at the trial hereof.

III.

During the entire time of employment of Plaintiffs, the Defendant had in force and effect a contract with the Operating Engineers, International Union, Local Union No. 552, which union was the designated bargaining agent of all employees of the Company, including these Plaintiffs, except employees in the Laboratory, Clerical, Supervisory, Administrative and Technical work of the plant. Said Contracts

had provision therein for wages, working conditions and benefits for Laborers in the Maintenance Division, covering Plaintiffs. In violation of the terms of the working agreement Defendant paid Plaintiffs fifty cents or more per hour less than they were entitled to under said working agreement and failed and refused to give Plaintiffs fringe benefits to which they were entitled, and failed and refused to give Plaintiffs vacations, sick leave and other benefits all of which were provided for in said contracts. And in violation of said contract now in force, copy of which is attached hereto and made a part hereof and marked Exhibit B, Defendant discharged all of said employees on January 4, 1957, except the following eight who were discharged on November 19, 1956, to-wit: Jesus Cruz, Raymundo Ortega, Manuel Velardo, Alberto Sanchez, Manuel Rogalio Reyes, Cruz Carabajal, Baldomero Medina and Guadalupe Duran. Said Plaintiffs were without cause discharged and other persons employed to perform the same work.

IV.

Said Plaintiffs now have due and owing to them the following appropriate amounts in wages by virtue of said contracts: Manuel Cedillo $4.500.00, Jose Hector Paquian $4,000.00, Hector Sepulveda $4,000.00, Jesus Cruz $1,500.00, Sixto Maltos $9,000.00, Alberto Sanchez $1,500.00, Pedro Duran $1,500.00, Maurilio Blanquez $2,000.00, Jose Ceniceros $4,500.00, Manuel Reyes $1,500.00, Raymundo Ortega $1,500.00, Cruz Carabajal $1,500.00, Juan Bueno $10,000.00, Juan Salazar $6,000.00, Jose Marian Duran

$1,500.00, Jose N. Nunez $6,000.00, George Cervantes $10,000.00, Baldomero Medina $1,500.00, Ramon Ortega $6,000.00, Gilberto Maese $6,000.00, Manuel Velarde $1,500.00, Blaz Cadena $3,500.00, Miguel Cadena $5,000.00, Ignacio Gonzalez $5,000.00, Juan Cobos $10,000.00, Jesus Moreno $5,000.00, Felipe Aguilar $3,500.00, Lorenzo Gonzalez $4,500.00, Isidro Esconedo $10,000.00, Angel Blanquez $5,000.00, Guadalupe Duran $1,500.00, Manuel Leyva $5,000.00, Gregoria Ceniceros $1,500.00, Juan Torres $6,000.00, Isaac Torres $5,000.00, Robert Torres $5,000.00, Jose Peralta Jr. $4,000.00, and Guadalupe Arguellas $1,500.00.

The exact amounts owing is known to the Defendant and Defendant is called upon to produce all records showing pay to Plaintiffs during the time of their employment together with all contracts Defendant had with the Union during the periods of employment referred to above.

V.

The Contracts have been approved by the National Labor Relations Board for employees of the Standard Oil Company of Texas during the time of their employment, and covering Plaintiffs.

VI.

In addition to the wages owing to Plaintiffs, Plaintiffs and each of them are entitled to accumulated benefits under said contract equal to approximately $1,000.00 per year for each employee Plaintiff during the term of his employment, and

Plaintiffs are entitled to full pay during the time they have been wrongfully discharged which amounts to approximately $1,000.00 per Plaintiff owing to this time.

VII.

Plaintiffs and each of them are entitled to be reinstated with full back pay for time lost, and Plaintiffs ask for mandatory injunction requiring the Defendant to comply with the contract of employment referred to and reinstate said Plaintiffs and to pay them the pay called for in said contract and grant them all benefits provided therein.

VIII.

This is a class action the same facts and points of law relating to all of said claims and Plaintiffs are entitled to maintain this suit jointly against Defendant by virtue thereof.

IX.

The contracts referred to herein were all executed under the National Labor Relations Act and direction of the National Labor Relations Board.

X.

Under the present contract laborers in the Maintenance Division are entitled to receive $1.6963 per hour or $13.57 per day for work. Plaintiffs during the time said contract has been in force have received from $1.06 per hour to $1.11 per hour, the exact amount paid each being known to the Defendant and in Defendant's records, which it is called upon to produce.

XI.

The defendant is a foreign corporation, Plaintiffs are residents of El Paso County, Texas, the amount involved exceeds $3,000.00, the suit involves the construction and violation of a collective bargaining contract under the National Labor Relations Act, and this Court has jurisdiction of said suit.

Wherefore, Plaintiffs pray that citation issue as provided by law and that upon trial hereof that they do recover their damages in the total sum of $165,500.00 in back wages, together with all fringe benefits, etc., set out above, $38,000.00 for wages owing since their wrongful discharge, and that Defendant be ordered to reinstate said Plaintiffs and enjoined from violating their contract, all as set out above, and for costs of suit and general relief.

GUINN AND GUINN

By

EXHIBIT "A"

Name	*Employed*	*Discharged*
Manuel Cedillo	7/ 3/52	1/ 4 57
Jose Hector Paquian	/ /52	1/ 4 57
Hector Sepulveda	/ /54	1/ 4 57
Jesus Cruz	6 20/55	10/19/56
Sixto Maltos	8/10/48	1/ 4 57
Alberto Sanchez	6/20/55	10/19 56
Pedro Duran	6/20/55	1/ 4 57
Maurillo Blanquez	/ /55	1/ 4/57
Jose Ceniceros	5/27/52	1/ 4/57
Manuel Reyes	5 20 55	10 19 56
Raymundo Ortega	5 20/55	10/19/56
Cruz Carbajal	5 20/55	10/19/56
Juan Bueno	1/ 6/46	1/ 4/57
Juan Salazar	/ /51	1/ 4 57
Jose Maria Duran	5 20/55	1/ 4 57
Jose N. Nunez	5 22/52	1/ 4/57
George Cervantes	1/ 6 47	1/ 4/57
Baldomero Medina	6/20/55	10/19/56
Ramon Oretga	7/10/52	1/ 4/57
Gilberto Maese	5/28/51	1/ 4 57
Manuel Velarde	6/20/55	10/19/56
Blas Cadena	6/ 9/54	1/ 4 57
Miguel Cadena	5/27/52	1/ 4/57
Ignacio Gonzalea	7/ 3 52	1/ 4/57
Juan Cobos	6/28/47	1/ 4/57
Jesus Moreno	6/10/52	1/ 4 57
Felipe Aguilar	5/16/53	1/ 4 57
Lorenzo Gonzalea	12/19/52	1/ 4/57
Isidro Escobedo	1/ 6 47	1/ 4 57
Angel Blanquez	10/15/52	1/ 4 57
Guadalupe Duran	5 20 55	10 19 56
Manuel Leyva	5/16/53	1/ 4 57
Gregorio Ceniceros	6 20 55	1/ 4/57
Juan Torres	5/ 6 51	1/ 4 57
Isaac Torres	/ 51	1/ 4 57
Robert Torres	/ /51	1/ 4 57
Jose Peralta, Jr.	6 8 53	1/ 4 57
Guadalupe Arguellas	/ /55	1/ 4 57